GETZ BROTHERS & CO. GMBH v. PAN-MALAYSIAN WOOD PRODUCTS SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) January 23 and March 3, 1980]
[Ipoh — Federal Court Civil Appeal No. 116 of 1979]

Practice and Procedure — Foreign company with no local office — Service of Writ on company with local office having control or management of foreign company — Whether company agent of foreign company and whether service good and proper — Discharge of solicitor — R.S.C. 1957, O.7 r.4 and O.9 r.8A.

Solicitor — Discharge of — R.S.C. 1957, O.7 r.4.

In this case the appellants were a foreign corporation with a registered office in Germany and without a local office. They entered into a contract with the respondents for the supply of machinery and the contract stated that a Swiss firm, with a local office acted as agents for the appellants. The writ in this case was served on the manager of the Swiss firm. Service was accepted and conditional appearance was entered for the appellants by Messrs. Skrine & Co. Subsequently Messrs Skrine & Co. obtained an order for discharge but this was not served or filed. Some considerable time later, Messrs Zain & Co., entered a memorandum of conditional appearance for the appellant without prejudice to an application to set aside the writ and service of the writ. The application to set aside was dismissed by the learned Judge who held that it was not made within a reasonable time. The appellant appealed.

Held: the Swiss company was clearly an agent of the foreign company and by virtue of Order 9 rule 8A of the Rules of the Supreme Court, 1957, the service was a good and proper service.

Cases referred to:-

(1) *Ramanathan Chettiar & Anor.* v. *Sivagami Achi* [1958] M.L.J. 187.

(2) *William Heinemann Ltd.* v. *Donald Moore Ltd.* and *G.N. Christie* [1960] M.L.J. 99.

(3) *Saccharin Corporation Ltd.* v. *Chemische Fabrik Von Heyden Aktienesellschaft* [1911] 2 K.B. 516.

(4) *Okura & Co., Ltd.*, v. *Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715, 721.

FEDERAL COURT.

Mohamed Ismail bin Mohd. Shariff for the appellants.

Lim Kean Chye for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal, an appeal of small compass, is concerned only with the question whether the service of the writ on the appellant was good service.

The appellant is a foreign corporation with a registered office in Germany. It is therefore a foreign entity, and ordinarily out of the reach of the jurisdiction of the courts of this country. At no time did it establish any office here. It had entered into a contract with the respondents for the supply of machinery. The contract was on the standard form not of the appellants but of Getz Bros. & Co. Inc. Kuala Lumpur, a company incorporated in Switzerland and having registered offices in Singapore and Kuala Lumpur. In the contract, the words "between Getz Bros. & Co. Inc. Kuala Lumpur (hereinafter called the Sellers" are in printed form. The words following "acting as agents for Getz Bros. & Co. GMBH, Hamburg" are type-written as are the words describing the identity of the purchasers, the respondents. The agreement was executed in this country by a Mr. Thomas W. Prunk who undoubtedly was at the relevant times the manager of the Swiss company.

Mr. Prunk was succeeded by a Mr. Innis and the writ was served on him. Service was accepted and an unconditional appearance was entered for the appellants by M/s. Skrine & Co., a firm of solicitors. These solicitors, some 7 months later, after delivering a defence and making a counterclaim and after acting in an interlocutory application for further and better particulars (though not at a later stage when the application came up for further consideration) sought to be discharged from the proceedings on the contention that they were mistaken that Mr. Innis had any authority to accept service, but, strangely, not on any contention that Mr. Innis had no authority to instruct them, though one would have thought that it necessarily followed and should have been pleaded.

The procedure for a solicitor to obtain a discharge is laid down in Order 7, rule 4, Rules of the High Court, 1957. In the first place, the solicitor making a discharge must serve a notice of his application on the party from whom he now seeks an order of court for him to cease to act. This the solicitors did not do until the matter came up for hearing. The hearing had then to be adjourned until after their compliance with this requirement. Then on May 31, 1974, the solicitors obtained an *ex parte* order. With this order, which they did not at any time extract and have not up to this moment extracted, the solicitors considered themselves discharged and out of the picture. But that rule specifically states that unless and until the solicitor has (1) served on every party to the cause or matter (not being a party in default as to entry of appearance) a copy of the said order, and (2) procured the order to be duly entered and filed, and (3) filed a certificate signed by him that the order has been duly served as aforesaid, he shall, subject to a change of solicitors by feasance or to the contingency of the death, bankruptcy etc. of the solicitor, be considered the solicitor of the party to the final conclusion of the cause or matter whether in the High Court or in the Federal Court. The terms of this rule are clear and explicit. Since there has been no change of solicitors executed by the appellants or by any other firm of solicitors and the contingency of death, bankruptcy etc. set out in rule 3 had not occurred, M/s. Skrine & Co., who had entered an appearance for the appellants, remain the solicitors on record up to the present moment.

In the meantime, an application was made by M/s. Rithaudeen and Aziz, a firm of solicitors who did not appear to have entered any appearance of any sort whatsoever, to set aside the service of the writ. By consent, the application was withdrawn, probably when it was realised that there were solicitors on record. That was on November 11, 1974. And there the matter lay until some 3 years later, until December 7, 1977, M/s. Zain & Co., another firm of solicitors, entered what is described as a memorandum of conditional appearance for the German firm, without prejudice to an application to set aside the writ and service of the writ. This application by summons-in-chambers was made on December 10, 1977 and was heard on April 3, 1978.

The standing of M/s. Zain & Co. did not appear to have been considered in the High Court and we must also say, in this court, but the case was argued at both levels on the basis that M/s. Zain & Co. had some standing of sort. The point was not taken before us and did not appear on the record. It was only discovered after an inspection of the court file.

In his judgment, the learned judge considered that the application to set aside for irregularity was not made within a reasonable time as it should have been done and he declined to exercise his discretion in favour of the application. He also thought that the dismissal of M/s. Rithaudeen and Aziz's application, which was by consent, led to the conclusion that the appellants had waived the irregularity.

It seemed to us, however, that the question of the propriety of the service of a writ issued for service within the jurisdiction of the court on Mr. Innis, the manager and duly appointed agent of the Swiss firm must be considered in relation to Order 9 rule 8A of the Rules of the High Court, 1957, a local rule which has no exact parallel elsewhere. It reads as follows:

"(1) In an action relating to any business or work against a person who does not reside in the Federation, or who is absent from the Federation, service of a writ of summons for service within the jurisdiction on any manager or agent, having at the time of service personally the control or management of such business or work for such person within the Federation, shall be deemed sufficient service whether such person is a citizen of the Federation or a subject of any of the Rulers or not."

As has been noticed, this is a purely local rule and undoubtedly it has particular reference to chettiar moneylending business in this country carried on by principals resident in India through local agents who more often than not are themselves principals in other transactions of a similar nature. Hill Ag. C.J. in *Ramanathan Chettiar & Anor.* v. *Sivagami Achi*[1] observed that this rule was "a deliberate departure from the English practice and (this was) done to meet the needs of local business." But undoubtedly it has wider applications and clearly the rule is framed as not to be limited to chettiar money-lending businesses.

In *William Heinemann Ltd. & Donald Moore Ltd.* v. *G.N. Christie,*[2] Thomson C.J. in his judgment observed at page 101 that "like all provisions relating to constructive service, (this rule) has to be read in the light of the general principle that a defendant must be informed that proceedings have been commenced against him. Such provisions are intended to ensure that when information cannot be conveyed to the defendant directly such steps are taken as experience shows will probably have the effect of bringing the information to his notice. Read in that light it would seem necessary to bring a case within Order 9 rule 8A that at the very least the relationship between a defendant and the person having management or control of his work or business as manager or agent should be such that the manager or agent should be under some obligation to bring service of a writ to the notice of his employer or principal."

It falls to be observed that in the numerous affidavits filed in this application, it has been nowhere contended by the Swiss firm that it was under no obligation of any sort to bring service of this writ to the notice of the German firm, or that the German firm was never advised by the Swiss firm's agent in Kuala Lumpur of the issue and service of the writ. On the other hand, the correspondence entered into between Mr. Thomas W. Prunk and his successors in office on behalf of the Swiss firm in Malaysia made constant and repeated references to "our Hamburg office" and in one instance to "those machines purchased through us." This correspondence referred to the defects in these machines which gave rise to the complaints of the respondents and to the action they took and which showed quite clearly that the complaints were in each case referred to Hamburg since they conveyed the "reaction" of "our Hamburg office" and the rejection of the respondents' claim by the German firm. The Swiss firm as the local agent clearly had this "obligation" in respect of complaints and by extension in respect also of the issue and service of the writ.

It remains to consider whether the Swiss firm has "the control or management" of the business of the German firm. The Court of Appeal in the *William Heinemann's* case had approved of the test in *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden Aktienesellschaft,*[3] of whether the defendants' agent within the jurisdiction had powers to enter into contracts on their behalf and the other test laid down in *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag*[4] of whether the defendants were doing business within the jurisdiction by a person and not through him. On either of these tests, the Swiss firm was clearly an agent within the jurisdiction and the conclusion is inevitable that the service was good and proper service.

For these reasons, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Zain & Co.; Kean Chye & Sivalingam.*

HUSDI v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Lee Hun Hoe C.J. (Borneo)) February 25 & March 27, 1980]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1979]

Criminal Law and Procedure — Statements made in the course of police investigations — Whether accused entitled to copies of statements — Impeaching credit of witness — Evidence Act, 1950, ss. 145 and 155(c).

Evidence — Cross-examination as to previous statements — Impeaching credit of witness — Whether accused entitled to copies of statements — Evidence Act, 1950, ss. 145 and 155(c).

In this case the following questions of law of public interest were referred for the decision of the Federal Court —

"(1) Whether a person charged with a criminal offence or offences triable summarily before a subordinate court is entitled in law at any, and if so, at what stage after his arrest to obtain copies of statements of witnesses recorded by the police in the course of investigations under Section 112 of the Criminal Procedure Code.

(2) Whether a person charged with a criminal offence or offences is entitled to obtain a copy of a statement made